AUCKLAND REGISTRY

M. No. 908/77

BETWEEN [redacted] SCHULZ, Tawa Court Flats 38 Tawa Road, Royal Oak, Auckland

Appellant

AND [redacted] SCHULZ 42 Hopefarm Avenue, Pakuranga

Respondent

[redacted]

NZLR

493

Hearing: 14th October, 1977

Counsel: Divers for Appellant
Rooke for Respondent

ORAL JUDGMENT OF CHILWELL, J.

This appeal appears prima facie to be one of the more straightforward that one receives in the domestic jurisdiction but it raises an important issue concerning the proper approach to be taken by a learned Magistrate when dealing with an application for variation of a maintenance order in respect of a child pursuant to Section 85 of the Domestic Proceedings Act 1968. The order in question comes within Part VII of the Act, that is the part relating to the registration of maintenance agreements.

I have had placed before me the original agreement dated 28th January 1972. It is in form a separation agreement but it provides, inter alia, for a complete settlement of maintenance and property matters. It is apparent from the terms of the agreement, apart from the evidence given on this application, that the parties are well-to-do people and, when one looks at the evidence, it is even clearer that they are well-to-do people.

An examination of the agreement indicates that the parties consciously and deliberately, with the aid of their separate legal advisers, compromised and settled all matters including maintenance. Of course itis only the maintenance provisions of the agreement which become registrable in the

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Magistrates' Court and become from that point onwards a maintenance order.

There were two children at the time when the agreement was signed who required maintenance, both in the custody of the wife. The agreed maintenance for each was $8 per week until each child attained the age of 16. The agreement went on to provide for an extension to the age of 18 in the common circumstances of educational need or training and that sort of thing.

The present application concerns the younger of the two sons. He was born on the [redacted] 1960. He attained the age of 16 in 1976. He is still requiring education and it is common ground between the parties that the maintenance provision runs on and is still effective.

I notice that there is further maintenance provision in paragraph 6 whereby the husband agreed to pay all school fees for the eldest child at St Kentigern College, but not for the cost of the education of the younger child at a private school.

On the 14th March 1977 the wife applied under Section 85. She listed her expenditure in respect of the younger son, P[redacted], at a total of $27.10 per week. She went on in her application to refer to the fact that this expenditure does not include the incidental expenses involved in running a household such as increased wear and tear, increased electricity and telephone bills and the like.

The husband defended the application. In his Notice of Defence he gave advance warning of his contention that the wife was well able to maintain the boy without additional assistance from him.

The learned Magistrate did not entirely agree with the

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figure of $27.10 per week. He considered that the wife's expenditure on the boy was in the vicinity of $20 per week. That figure is accepted by the Appellant on the basis that that amount is in fact reasonably incurred by the wife or her son. I am accordingly mercifully relieved from having to determine quantum.

The husband gave no evidence at the hearing before the learned Magistrate. Counsel informed the learned Magistrate that the husband could afford to pay the amount claimed. That being so, there was no point in the husband giving evidence. The wife made a hearsay statement that his income was in the vicinity of $30,000 a year. One infers that that is the class of person that the Court is dealing with.

The only question in issue is whether the husband should pay any more than $8 being the amount which he agreed to pay in 1972. It is his counsel's contention that the parties should contribute equally towards the maintenance of the boy, and accordingly it was wrong for the learned Magistrate to increase the figure from $8 to $20 per week. He should, it is submitted, have passed some of the burden on to the wife.

This case illustrates the importance of the parties having faith in the Magistrates' Courts. There are moves afoot to deprive this Court of jurisdiction in family law matters and there are some who advocate that the learned Magistrates should have exclusive jurisdiction. There are others who argue that there should be a separate Family Court. I mention this because the Appellant obviously is disturbed at his treatment. The learned Magistrate refused to permit the wife to be cross-examined concerning her property. It is clear that she has property of a substantial value. It may be that in the end the learned Magistrate might have taken the view that for the purposes of the particular case no weight was to be attributed to the wife's property and

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her ability as a property owner to shoulder in part financial responsibility for her son. But it was too early in the hearing for the learned Magistrate to rule that evidence inadmissible. Infallibility is a failing of human nature. It should never be seen to show its head in judicial proceedings.

I believe that had the learned Magistrate listened to what would have been a very brief cross-examination on the topic, and had he listened to the submissions which counsel would have made, this appeal may never have seen the light of day. Maybe his decision would have been the same as it was. The Appellant, knowing that his case had been fully heard and considered, might well have left it at that. How can the public have faith in a judicial system which refuses to listen?

In my judgment the question of the wife's property was a matter relevant for consideration. Its weight is another matter. The learned Magistrate dismissed it from his mind entirely. That being so, I have the power on this appeal to review so much of his decision as may be regarded as discretionary.

I should really send the matter back to enable the judicial process to be properly conducted where it should have been. This would involve hardship to the parties. Accordingly I intend to determine the matter myself.

Hall v. Hall (1970) NZLR 1132, a decision of Beattie J., is regarded as being the current leading authority on the matters to be taken into account in applications for a variation under Section 85 involving a registered maintenance agreement in respect of a wife's maintenance. I think the head-note correctly illustrates the basic approach taken by the learned Judge where it says in point 1:

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> "It was no doubt the intention of the Legislature in enacting ss.57 and 125 of the Domestic Proceedings Act 1968 to give registered maintenance agreements much greater force than before because of the conciliation procedures in the Act encouraging parties to settle matters amicably. Nevertheless the Court is still paramount in the matters of maintenance fixation and variation. The previously agreed maintenance should be taken as a starting point but the Court does not then have to calculate the precise effects in monetary terms of the change of circumstances and apply the result as an immutable measure of variation nor is the Court impelled to go back to s. 27 (see p.1134) and apply all those considerations on a variation application."

It certainly has been the policy of the Courts for a long time to uphold agreements which have been solemnly entered into by the parties and what was said in Hall v Hall is but one of the many judicial pronouncements to that effect. There are many reasons for this, not the least of which is the desirability of encouraging the parties to marriages which have broken down to settle their differences in a commonsense way without bitterness. If the Courts were too readily to allow these agreements to be brushed aside then the Courts would be destroying the principle to which I have just referred.

It is true that Beattie J. was dealing with maintenance in respect of a wife and not a child. In referring to the relationship between Sections 27 and 85 of the Act he said at page 1137:

> "If the Legislature had intended that the principles enunciated in s.27 should apply to variation proceedings, it would have been very easy for Parliament to have said so. I consider it highly significant that the Legislature enacted s.85(2) and (3) in the precise terms of s. 39(1)(c) with one single exception already mentioned. I accordingly consider that the Legislature intended in its statutory purpose that variation proceedings under s. 85 should be in a category of their own and that originating maintenance proceedings should be in an entirely different category. It follows that if I am correct in this reasoning, then there is no need for detailed and precise guide lines in s. 85. Guide lines in a general way are supplied by the wording of s.85 itself and the effect of the decision in Kennedy v. Kennedy (supra), namely that any variation must be directly justified by the change in circumstances

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> which has occurred. I have already said that while recognising the increased force of maintenance agreements under the new legislation, the Court's jurisdiction is still paramount. It may well be that if a change in circumstances is proved some of the factors in S.27 may need to be taken into account by the Court but I find no direction they must be."

In my judgment there is nothing in the 1971 amendments to the Act which in any way detracts from his Honour's judgment.

Mr. Divers has submitted that while Hall v. Hall may be considered the last word insofar as maintenance orders for wives are concerned, it is not the last word insofar as maintenance orders for children are concerned. He referred me to Section 35 of theAct which sets out the matters to which the Court may have regard. Under Section 35 a maintenance order can be made against either the wife or the husband. In volume 2 Bromley & Webb Family Law (1974) the learned author says at page 728:

> "The 1968 Act seeks to impose upon parents an equal responsibility in providing for their children."

That is a very general statement of principle with which I agree. Mr. Divers went further and suggested that that principle was akin to a presumption. I do not accept that submission.

I now turn to a wife's maintenance. Section 27 commands that certain matters be taken into account such as the needs of the wife and her ability to provide for her needs. Then the section goes on to refer to other matters, again in terms of command, such as the means of the husband and his responsibilities. Those commands are more like statutory presumptions than are the matters referred to in Section 35. Section 35 is not expressed in terms of command. I reject the argument that Section 35 places this type of variation

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application in a different position from a wife's maintenance. In my judgment Hall v. Hall and the principles enunciated there apply with equal force to the variation of an order relating to a child.

The present case is not concerned with the principle enunciated in Kennedy v. Kennedy (1966) NZLR 297 because the change in circumstances in monetary terms of the difference between $8 and $20 a week is common ground.

In my judgment the approach which should have been made by the learned Magistrate was to have first considered the provisions of the maintenance agreement. That document clearly requires the husband to pay weekly maintenance for his younger son. It further requires him to pay the private school fees of the elder but not those of the younger son. Clearly the basis of the weekly provision for maintenance was that it was to fall on the husband. At that time the parties considered that the figure was $8 per week. That is the obligation which he undertook. That figure has now been eroded by inflation and by the increased expenditure involved in catering for a 17 year old; it has risen to $20 per week. Why, then, should the husband now expect to be relieved in part from meeting his weekly maintenance obligation which in principle he solemnly agreed to meet?

Is this a case where the Court as a matter of discretion should take into account the ability of the wife to contribute? The contributions referred to in Section 35 1(c) take the form of "oversight, services, money payments or otherwise".

In the present case the wife earns $95 net per week. At the time the agreement was entered into she was earning $48 net per week. By contrast her husband can afford to pay as much as the $27.10 asked for. As I said earlier, he is

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probably in the $30,000 a year class. That disparity, in any case, must have had a great bearing upon the way in which the agreement was framed.

While there may well be other cases where the Court would feel it proper to make the wife meet some of the increase in maintenance required, this does not appear tomme to be that sort of case. I think this is a case where the principles of the original agreement should be honoured, and where the Court should pay more than lip service to that principle. In my judgment the learned Magistrate was quite correct in making the order which he did. Accordingly I dismiss the appeal.

I would like the learned Magistrate to reflect that it has taken two hours of my time to hear and deal with this matter. An extra half an hour of his time may have saved me and the Court staff a good deal of unnecessary time.

With regard to the question of costs I had occasion earlier this year to attend a Judicial Seminar in Hobart. A paper was delivered by one learned Judge on topics affecting the administration of justice. He advocated the view that on appeals, particularly those which have been allowed, costs should be borne by the State. His reason for this was that the parties had been compelled to take the matter further because of a mistake on the part of the Judge or Magistrate appealed from. There is much to b e said for this view. However, in the present case the appeal has been dismissed. In saying that, I accept Mr. Diver's submission that nevertheless the appeal was properly brought for the reasons which I have indicated. We have not in this country, as yet, broken away from the general principle that costs follow the event. I am bound to exercise my judicial discretion according to well-known principles and that is one of them. The successful respondent is entitled to

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her costs which I fix in the sum of $75.

Solicitors:

Churton, Hart & Divers, Auckland for Appellant
Holmden Horrocks & Co., Auckland for Respondent

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